

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

**STATE OF DELAWARE**

v.

**ARTHUR W. DAY**

Defendant.

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CRIMINAL ACTION NUMBER

IN-07-10-1964

ID No. 0710015842

*Submitted: March 10, 2010*

*Decided: July 8, 2010*

***MEMORANDUM OPINION***

*Upon Motion of Defendant for Postconviction Relief - **DENIED***

HERLIHY, Judge

Arthur W. Day has filed for postconviction relief pursuant to Criminal Rule 61. In his application, he alleges that his right to effective assistance of counsel as guaranteed by United States and Delaware constitutions was violated due to his attorney's performance.

### ***Factual Background***

Before detailing Day's motion, it is helpful to examine the facts leading up to his arrest and incarceration. On October 12, 2007, Trooper R. Strecker of the Delaware State Police notified New Castle County Police Officer Marc Alfree, assigned to the Safe Streets Unit, that he had Day in custody pursuant to an active warrant. Strecker indicated to Alfree that during a property sweep in the Woodfield Apartments that he was checking the tags of an unoccupied Chevrolet Suburban with the engine running located at the apartment complex. A DELJIS search of the license plate number revealed that the vehicle was registered exclusively to Day and he had an outstanding warrant. Observing only one male near the vehicle, Strecker stopped the male and ascertained it was in fact Day.

Alfree went to Strecker's location along with Senior Probation Officer Jeanette Lingafelt. Due to the fact that Day was on active probation, Lingafelt executed an administrative search of the vehicle and recovered a total of 4.3 grams of cocaine, individually wrapped in 5 bags.<sup>1</sup>

Day was indicted on three charges: Possession with Intent to Distribute Cocaine

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<sup>1</sup> All of this information comes from the affidavit of probable cause used to secure an arrest warrant for Day's on the drug charges.

(“PWID”);<sup>2</sup> Use of a Vehicle for Keeping Controlled Substances;<sup>3</sup> and Criminal Trespass Third Degree.<sup>4</sup> The State entered *nolle prosequi* on the Trespassing charge on March 17, 2008. On March 27th Day pleaded guilty to Keeping a Vehicle in exchange for the State entering *nolle prosequi* on the PWID charge. The State indicated to the Court that it intended to move to classify Day as a habitual offender but, as part of the agreement, would not recommend more than 5 years at Level V. On June 13, 2008, this Court granted the State’s motion for habitual offender status and sentenced Day to 5 years at Level V, in accordance with the State’s recommendation.

Day attempted to appeal to the Delaware Supreme Court. However, he did not perfect his appeal within the time allowed. The Supreme Court held the delay was not attributable to Day, but to an incorrect address at the prison. The Court remanded for an evidentiary hearing to determine if Day had directed his attorney to file an appeal.<sup>5</sup> At the subsequent evidentiary hearing, this Court determined that Day did not inform his attorney to file an appeal. That finding ended Day’s direct appeal.

Day has now filed a motion for postconviction relief. In it he raises three claims of ineffective assistance of counsel: first, that his attorney coerced him into taking the plea;

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<sup>2</sup> 16 Del. C. § 4751.

<sup>3</sup> 16 Del. C. § 4755(a)(5).

<sup>4</sup> 11 Del. C. § 821.

<sup>5</sup> *Day v. State*, 962 A.2d 916, 2008 WL 4946207, at \*1 (Del.).

second, that his attorney did not adequately review Probation and Parole Guideline 7.19 (regarding probation administrative searches) and if he had, would have seen the “numerous violations;” and third, his attorney was ineffective because he failed to file a motion to suppress the evidence found in Day’s vehicle. Day’s trial counsel submitted an affidavit denying that he was ineffective. In response to that affidavit, Day sheds more light on his claims. All three alleged grounds for ineffectiveness share a common theme: Day’s trial counsel fell below an objective level of reasonableness because he failed to file a motion to suppress the cocaine found inside his vehicle.

### ***Discussion***

Before undertaking consideration of the merits of Day’s motion, the Court is required to determine if there are any procedural impediments to doing so.<sup>6</sup> In this case there appears to be one, namely that his motion is time barred for being filed more than one year after his conviction became final.<sup>7</sup>

The record on this bar is somewhat murky. Day was sentenced on June 13, 2008. He filed an untimely notice of appeal *pro se*. Rather than dismissing it for that reason, the Supreme Court remanded the case on December 8, 2008 (date of mandate). The Supreme Court asked this Court to determine if Day had instructed his attorney to file an appeal. When remanding it, the matter was marked “Case Closed.” On January 21, 2009, this Court,

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<sup>6</sup> *Younger v. State*, 580 A.2d 552, 554 (Del. 1990).

<sup>7</sup> Super. Ct. Crim. R. 61(i)(1).

after conducting the remand hearing, notified that Supreme Court that Day had not requested counsel to file an appeal. Accordingly, the case ended, at least arguably on that date.

Under Rule 61(i)(1), Day's conviction became final on July 14, 2008.<sup>8</sup> In many ways, his untimely appeal is a nullity and did not stop the one year finality time clock from running from that date. Arguably, on the other hand, it operated to stop the clock and his conviction became final on December 8, 2008, the date of the mandate. Or arguably, it became final on January 21, 2009, the date this Court wrote to the Supreme Court that Day had not notified counsel he wanted an appeal.

Day's current motion was filed on January 19, 2010. The Court also notes that Day wrote this Court on May 20, 2009, indicating that his family had paid for transcripts to be used for his Rule 61 motion. Since his family did not have them, he wanted an extension of time within which to file his motion, for which there is no provision under Rule 61. On June 25, 2009, the Court wrote Day to report the transcripts had been given to his parents on June 4th.

The earliest deadline for his motion was July 14, 2009, yet no motion was filed. When he finally filed his motion in January 2010, there were not transcript pages attached and/or referred to in order to support his motion.

The Court views that the deadline for Day to file his postconviction motion was July 14, 2009. Arguably, it could be December 8, 2009. In either case, his motion filed on

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<sup>8</sup> *Day*, 2008 WL 4946207 at \*1; *Jackson v. State*, 654 A.2d 829, 832-33 (Del. 1995).

January 19, 2010, is time barred. In the unlikely event that this Court's letter of January 21, 2009, is the "final" date, his motion is timely, as that is two days before this Court wrote the Supreme Court, making it "timely" by two days.

To give Day the benefit of the doubt, the Court will treat his motion as timely filed and go on to consider it on the merits.

Recently, the Supreme Court has reiterated the standard applicable to claims of ineffective assistance of counsel:

Ineffective assistance of counsel claims are reviewed pursuant to the two-pronged standard established by the United States Supreme Court in *Strickland v. Washington*. Under the first prong of *Strickland*, the defendant must demonstrate that "counsel fell below an objective standard of reasonableness," with reasonableness being judged under professional norms prevailing at the time counsel rendered assistance. Under the second prong of *Strickland*, the defendant must demonstrate a reasonable probability that the deficiencies in counsel's representation caused the defendant actual prejudice.<sup>9</sup>

Courts are instructed not to look backward on the outcome of the trial without regard to trial strategy:

In assessing the reasonableness of counsel's conduct, courts must eliminate the distorting effect of hindsight, reconstruct the circumstances of counsel's challenged conduct, and evaluate the conduct from counsel's perspective at the time. Moreover, counsel's conduct is afforded a strong presumption of reasonableness. Thus the defendant must overcome the strong presumption that the challenged action might be considered sound trial strategy.<sup>10</sup>

Delaware courts have held multiple times that an attorney's failure to file a motion to

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<sup>9</sup> *State v. Smith*, 991 A.2d 1169, 1174 (Del. 2010)(citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

<sup>10</sup> *Id.*

suppress, when he had an reasonable belief that such a motion would not be successful, falls within the objective standard of reasonableness required under *Strickland*.<sup>11</sup> After reviewing the plea colloquy, the Court is satisfied that Day's attorney made an assessment of the circumstances surrounding the case and concluded that a motion to suppress had no merit.

During the colloquy, Day's attorney stated:

Your Honor, we had a contested [violation of probation] hearing, the judge was gracious enough to allow us to delve a little bit into the issue concerning the suppression, I was able to ferret out the facts that there isn't an issue. There were three actual grounds for which the search could have taken place. There was the administrative search that was correct and done. There was a search incident to arrest, and there was an inventory search.<sup>12</sup>

In short, because of the contested VOP hearing, Day's counsel had more than his client's version or a police report. The attorney reviewed the circumstances surrounding the stop and analyzed whether a motion to suppress would be successful. He concluded it would not be. This was trial strategy for counsel to decide and will not be second-guessed by the Court. Certainly in this case, Day's attorney's actions were objectively reasonable and Day's second and third grounds fail the first prong of *Strickland*.

Further, assuming a violation, Day would not be able to show any prejudice resulting from his attorney's failure to file a motion to suppress. The Court, after reviewing the affidavit of probable cause that accompanied the application for an arrest warrant, concludes

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<sup>11</sup> *State v. Gregory*, 2005 WL 3194482, at \*3 (Del. Super.); *State v. Poteat*, 2005 WL 914472, at \*1 (Del. Super.); *State v. McCurley*, 2004 WL 2827857, at \*4 (Del. Super.); *State v. Powell*, 2003 WL 194929, at \*2 (Del. Super.).

<sup>12</sup> Plea Colloquy Tr. at 13:8-17.

that the police did not violate Day's 4th amendment rights. The affidavit details that Trooper Strecker ran the tags of Day's Suburban and found that he had an active warrant. Seeing only one male near the vehicle, he had probable cause to believe that male was Day, a fact which he later confirmed. Day was then lawfully arrested and his vehicle was searched incident to arrest.<sup>13</sup> There were no constitutional violations and the evidence would not have been suppressed. Therefore, even assuming the Court found Day's attorney's actions not to be objectively reasonable, which it expressly does not, Day fails to establish prejudice as required by *Strickland*.<sup>14</sup>

Day's initial motion claims that the guilty plea was coerced because of attorney's lack of adequate representation. After the Court reviewed the plea colloquy, it finds that Day was not coerced into taking a plea. The colloquy was long and detailed. While Day initially expressed some hesitation in taking the plea, after further consulting with counsel during the colloquy, he decided to take the plea. The Court repeatedly asked Day if the plea was his choice and he answered that it was. Also, it repeatedly informed him of his right to proceed to trial that day, as scheduled, and that it was a decision that only Day could make. Day voluntarily waived his right to trial, and he expressly waived his right to pursue a suppression motion. The Court is satisfied that he was not coerced.

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<sup>13</sup> See 11 Del. C. § 2303.

<sup>14</sup> Because the Court holds the search would withstand constitutional scrutiny on separate grounds, any alleged violations of Probation and Parole Guideline 7.19 are moot and do not need to be analyzed.



***Conclusion***

For the reasons stated herein, defendant Arthur Day's motion is **DENIED**.

**IT IS SO ORDERED**

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**J.**